***United States Court of Appeals***

***for the Second Circuit***


# APPELLEE'S BRIEF

75-2107

To be Argued by
STEPHEN M. LATIMER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ELIZABETH POWELL, ET., AL.,

PLAINTIFFS APPELLEES

AGAINST

BENJAMIN WARD ET., AL.,

DEFENDANTS APPELLANTS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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P/S

# APPELLEES BRIEF

Respectfully submitted,

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PLAINTIFFS APPELLEES *

AGAINST *NO 75-2107

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DEFENDANTS APPELLANTS.

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# APPELLEES BRIEF

## QUESTIONS PRESENTED

1. Does the chief security officer of a prison possess that degree of interest in the outcome of disciplinary proceedings involving breaches of prison security so as to render her inherently unable to be a neutral and detached hearing officer?

2. Should this court apply the rule announced in Crooks v Warne 516 F 2d 837 (1975), that under ordinary circumstances a prisoner may not be held in segragation for more than 48 hours without a hearing, to the prison generally?

## STATEMENT OF THE CASE

A. Proceedings in the District Court.

On October 22, 1974, appelleeges filed a complaint pursuant to 42 U.S.C. Sec. 1983 alleging, among other things, that all disciplinary proceedings at Bedford Hills Correctional Facility held since July 1, 1974, which may result in solitary

confinement were conducted in violation of the Supreme Courts mandate in Wolff v McDonnell 418 U.S. 539 (1974). The complaint alleged that prisoners are given no advance written notice, are not permitted to call witnesses in their behalf and are not given written disposition of charges including a statement of reasons relied on. Plaintiffs seek appropriate declaratory and injunctive relief. In February, 1975, the complaint was amended to include women incarcerated in Matteawan State Hospital in what the Department of Correctional Services labeled the Fishkill Correctional Facility Female Unit. (8) [1] The defendants below, appellants here, never interposed an answer to the original or amended complaint.

Shortly after the complaint was filed Plaintiffs moved for a preliminary injunction pursuant to FRCP 65 to require the defendants to conduct disciplinary proceedings in accordance with established due process standards. The court held five days of hearings which explored virtually every aspect of disciplinary proceedings at Bedford Hills including the adjustment committee and the superintendents proceedings. [2]

While most of the testimony centered on disciplinary proceedings held as a result of a disturbance at Bedford Hills on August 29, 1974, there was testimony about disciplinary

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1. Numbers in parentheses refer to the appendix. Numbers in parentheses followed by "a" refer to the supplemental appendix.

2, Under the rules then in effect, both tribunals could place an inmate in segregation. While under the amended

proceedings involving unrelated infractions that occurred both before and after August 29, 1974. (15 a - 16 a) Based on this testimony the court found that the same procedures were employed in all disciplinary proceedings regardless of whether they were or were not related to the disturbance 392 F. Supp. at 630-31. That finding is not challenged. The court then held that Wolff procedures had not been followed at Bedford Hills and mandated corrective procedures for all disciplinary proceedigns that may result in confinement in Special Housing, [3] including 1) written notice 24 hours prior to the hearing, 2) the right to call witnesses under certain circumstances 3) a written statement of evidence relied on and reasons for any actions taken, 4) an impartial hearing officer and 5) limited prehearing confinement 392 F. Supp. at 632, 633. Appellants only appeal from items 4 and 5.

B. Statement of Facts. [4]

Prior to July 1, 1974, disciplinary proceedings at Bedford Hills were conducted in a manner thought by the State to conform to this Courts mandate in Sostre v McGinnis 442 F 2d 178 ( 2 Cir. 1971). After July 1, 1974, the prison did not change its procedures to conform to the more stringent requirements.

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(continued) 2 regulations only the superintendents Proceeding may result in segregation (appellants br p 3 n***) those regulations do not comport with the District Courts order in several important respects including the right to call witnesses, the impartiality safeguards and the limitations on pre.hearing segregation.

3 See 7 N.Y.C.R.R. Sec. 300 et. seq.

4 Because the appeal is limited to the issues of the

of Wolff.

It is not disputed that on August 29, 1974, there was a serious disturbance at Bedford Hills. The disturbance involved 54 women of whom 43 were the subject of adjustment committee hearings and superintendents proceedings, the two forms of disciplinary action available. (28).[4]

The hearings were conducted by Deputy Superintendent Clement, then deputy superintendent for security services (26). Ms. Clement testified that she is the supervisor of the security force which includes the uniformed correction officers of all ranks. (40) Her direct responsibility includes perimeter security, meaning the fence surrounding the prison, and internal security (40) She testified that internal security entails the entrance of contraband and dealing with disturbances within the prison. (41) Ms. Clement further stated that while every employee has some function to perfom in dealing with a disturbance, her job description as the prisons chief security officer makes that her specific responsibility (41). Further inquiry by plaintiffs counsel into Ms. Clements personal and possible pecuniary interest in quelling a disturbance was precluded by the court. (41).

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(continued) 4 Deputy Superintendent for Security acting as hearing officer in certain disciplinary proceedings and the propriety of the seven day prehearing confinement, only facts relating to those issues are discussed.

Margaret Gatling testified to the following conversation held before the date of her superintendents proceeding:

> A. I was seeing-- I must have seen the Adjustment Committee something like nine times, and then one night I requested to see Miss. Clements, and she let me see her, and I talked to Miss. Clements and I told her that, being that she was the Deputy Superintendent of Security and because of the disturbance technically speaking the security of the institution was supposedly threatened, it would be impossible for her to render a fair and impartial verdict against me, and I told her, also told her that I was aware that the charges and my time had already been drawn up. (18)

She voiced her objections to others,(2a) yet Ms. Clement did not disqualify herself.

Ms. Clement testified that she was on vacation on August 29, 1974, that she returned to work on August 1, 1974, and was assigned to conduct all superintendents proceedings resulting from the distrubance, that until September 11, 1974, when the first hearing was held she had no specific duties with respect to the disturbance other than to conduct the superintendents proceedings (46) and that she never discussed the disturbance with Superintendent Warne, her inmediate superior (47-48). Given Ms. Clements direct responsibility for prison security this testimony is simply incredible.

It is not disputed that the first superintendents proceeding was held two weeks after the disturbance. Cyndi Reed

testified that she spent sixteen days in segregation before she was notified of charges against her (1a). Margaret Gatling was in segregation for more than 25 days without a hearing (3a), Marsha Padilla had her superintendents proceeding on September 24, 1974, 26 days after the disturbance, (6a) and Althea McDaniel 24 days afterward (7a). Elizabeth Powell, at an adjustment committee hearing on September 2, 1975, asked when she would receive a superintendents proceeding and how long she would be kept in segregation. She was told nothing (9a).

Deputy Commissioner Burke admitted that department regulations permitted such extended pre-hearing confinement. He testified that a person could be confined in segregation for as long as 42 days without any formal charges lodged against her. (11a). He then stated:

> Q. So that at the end of this 42-day period, where this person has been confined in a special housing unit without any charges against her at this time, the Adjustment Committee can then say, "Go back to the general population"; is that true?
>
> A. That is true. (12 a)

C. Finding and Order Appealed from

The District Court held that disciplinary proceedings must be conducted before neutral and detached hearing officers. 382 F. Supp at 633 Based on the testimony of Deputy Superintendent Clement, (41-44) and Margaret Gatling (19-20 2a) the court decided that Ms. Clement's responsibility as the prisons chief security officer gave her a substantial personal and professional interest

in punishing breaches of security. Accordingly the court concluded that " it is improper for a prison official whose primary concern is prison security to preside over Superintendents Proceedings (or Adjustment Committee Proceedings) where the alleged misbehavior purportedly threatened the security of that same institution." 392 F. Supp. at 633. The court then ordered:

> Neither the Deputy Superintendent for Security , nor any person whose job involves direct responsibility for institutional security, shall be a member of any Adjustment Committee or Superintendent's Proceeding at which an inmate is charged with an act which purportedly threatens the security of the prison. (76)

On the issue of extended pre-hearing confinement, the Court found that some pre.-hearing confinement may be necessary, but limited that confinement to" that brief period required to draft and file charges and to give the required 24 hours written notice of hearing" 392 F. Supp. at 632. Based on the undisputed evidence the court found that many inmates accused of involvement in the August 29, incident were held in segregation for as long as four weeks before they received a hearing 392 F. Supp. at 630. Accordingly the court directed that:

> No prisoner should be confined to special housing for more than seven days while her case is "pending investigation" by the Adjustment Committee 392 F. Supp. at 632

Approximately four weeks later, this court in Crooks v Warne 516 F. 2d 837 ( 2 Cir 1975.) with full knowledge of Judge Stewarts

decision, Id at 840, limited pre. hearing confinement to 48 hours in ordinary circumstances. Id. at 839.

ARGUMENT

POINT I

THE DEPUTY SUPERINTENDENT FOR SECURITY HAS SUCH AN INTEREST IN THE OUTCOME OF DISCIPLINARY HEARINGS INVOLVING BREACHES OF SECURITY THAT SHE CANNOT BE A NEUTRAL AND DETACHED HEARING OFFICER.

It is axiomatic that a neutral and detatched decision maker is a basic element of due process. That applies with equal if not more force to administrative agencies that adjudicate as well as to the courts. Withrow v Larkin U.S., 95 S. Ct. 1456, 1464 (1975) Gibson v Berryhill 411 U.S. 564, 579 (1973) Goldberg v Kelly 397 U.S. 254 (1970). Ohio Bell Telephone Co. v P.U.C. 301 U.S. 292 (1937) Not only must the decision maker be impartial, but the hearing must be clothed "with the very appearance of complete fairness." Amos Treat& Co. v SEC 306 F 2d. 267 (D.C. Cir. 1962) Withrow v Larkin, supra, Gibson v Berryhill, supra, In Re Murchison 349 US 133, 136 (955) Tumey v Ohio 273 U.S. 510, 532 (1927) Simard v Board of Education 473 F 2d. 988,993 (2 Cir. 1973). The requirement of an impartial decision maker is as applicable in prison disciplinary proceedings as in other administrative proceedings. Wolff v McDonnell 418 U.S. 539 (1974) Crooks v Warne, supra 516 F 2d at 839 U.S. ex rel Miller v Twomey 479 F 2d 701,718 (7 Cir. 1973) Taylor v Schmidt 380

F. Supp. 1222 (W.D. Wisc 1974) Diamond v Thompson 364 F. Supp. 659 (M.D. A.1A 1973) Sands v. Waignwright 357 F. Supp 1262, 1084 (M.D. Fla 1973) Colligan v U.S. 349 F. Supp 1233, 1237 (E.D. Mich 1972).

Because impartiality is largely subjective, the courts have identified certain situations where human experience teaches that there is a great danger that the degree of prejudice or actual bias by the adjudicator will be so great that he or she cannot render a fair and impartial decision. Among these are 1) cases in which the adjudicator has a direct or pecuniary interest in the outcome. Withrow v. Larkins, supra Gibson v Berryhill, supra Ward v Village of Monroeville 409 U.S. 57 (1972) Tumey v Ohio, supra, and 2) cases in which she has been the target of personal abuse or criticism from the party before her. Withrow v Larkins, supra, Taylor v Hayes 418 U.S. 488, 501-503 (1974) Mayberry v Pennsylvania 400 U.S. 455 (1971) Pickering v Board of Education 391 U.S. 563 578-79 n 2 (1968).

To determine whether the Deputy Superintendent for Security has such an interest in the outcome of disciplimary proceedings involving breaches of prison security, we must ask whether her inherent bias or prejudice will create a risk that she cannot render an impartial decision. As the Supreme Court said in Murchison, supra 349 U.S. at 136:

> That interest cannot be defined with precision. Circumstances and relationships must be considered. This Court has said, however, that "Every procedure which would offer a possible temptation to the average man

> as a judge * * * not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law." Tumey v State of Ohio, 273 U.S. 510, 532, 47 S. Ct. 437, 444, 71, L.Ed 749.

Tumey, the leading case on interest, involved the mayor of a town who supplemented his salary with a proportion of all fees and costs levied by him. The court held that his direct pecuniary interest in collection of fines gave him too great an interest in adjudication to render him impartial. In Ward v Village of Monroeville, supra, the Supreme Court held that a more indirect interest would create an unconstitutional degree of bias. There it was found that the mayors executive responsibilities for village finances gave him too strong an incentive to maintain a high level of contribution from the mayors court. Id at 60.

After analyzing the relevant case law, a leading commentator has concluded that "the interest may be pecuniary or professional, it may be based upon a relation to a party or it may involve no more than a pre-determination to achieve a particular objective." Davis, Administrative Law Treatise (1958 ed.) Sec. 12.06. The test is whether the bias or prejudice stems from an extra judicial source and enhances the probability that a decision will be made on some basis other than the evidence adduced at the hearing U.S. v. Grinnell Corp. 384 U.S. 563, 583 (1966) Wolfson v Palmieri 396 F. 2d 121 (2 Cir. 1968). Thus it has been held that a college board of trustees with a strong interest in breaking a teachers strike could not adjudicate the legality of the strike

Lake Michigan College Federation of Teachers v Lake Michigan Community College 390 F. Supp. 103, 134 (W.D. Mich 1974)

The same principles apply in the context of prison disciplinary proceedings. Thus in Sands v Wainwright supra, it was held that someone who has personal knowledge of any material fact or has any personal interest in the out come is disqualified from being a member of a prison disciplinary committee. Similarly in Colligan v United States, supra, in order to eliminate an inherent "command influence" it was held that persons working in supervisory or subordinate positions to those bringing charges could not adjudicate the charges.

The problems inherent in having persons with direct responsibility for security adjudicate matters involving breaches of that security were discussed in Taylor v Schmidt, supra 380 F. Supp at 1226. Some factors to be considered are that officers filing reports work under the direct supervision of the disciplinary hearing officer, the hearing officer may have frequent contact with the prisoner, and the effect on relationship with staff and prisoners if the prisoners word is accepted over that of the guards. The court concluded:

> These institutional pressures are particularly forceful with respect to the participation on the committee of the Associate Warden for Security and other top security officers; and as a result of these factors and others, the committee is predisposed to believe that the conduct report is accurate unless the inmate shows otherwise. Id.

Thus not only do senior security personnel have an inherent bias in situations involving breaches of security, that bias will cause them to pre-judge the case, thus effectively turning the presumption of innocence on its head and placing the burden of proof of the accused, contrary to basic motions of fairness.

The interest of the Deputy Superintendent for Security in the outcome of disciplinary proceedings within the area of her job function is analogous to the interest of the Mayor of Monroeville, Ohio in collecting fines to buttress the village treasury, and to the interest of the Board of Trustees of Lake Michigan Community College in breaking a treachers strike. Deputy Superintendent Clement supervises all security personnel including correction officers up to the rank of assistant deputy. She is primarily responsible for dealing with any disturbance within the facility (41). Standing alone these relationships which were severely criticized in Taylor supra and Colligan supra, are sufficient to prohibit her from being impartial [5]

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5 The District Court precluded any further inquiry into the direct personal and pecuniary interest of Deputy Superintendent Clement:

Q And it would be--if you were unable to deal successfully with a disturbance, would it reflect adversely on your record?

MR. SATTLER: I object

(Question read.)

THE COURT: Sustained. (41)

* * *

MR. LATIMER: This is an official at the institution who is charged with the very security of the institution and she then conducted proceedings--disciplinary proceedings against--

THE COURT: I would think, Mr. Latimer, that since it is her job to maintain security and safety, if there is no security or no safety the consequences would be fairly predictable.

MR. LATIMER: No. I would suggest then that she was not the person to conduct the superintendent's proceedings stemming

But there is no more. It is beyond belief that for the month immediately following the riot the prisons chief security officer had no connection with investigations to determine its causes, and of the means to prevent future disturbances. (see post p8 ). However, even if that is the case Ms. Clements direct responsibility for institutional security gives her such a direct and immediate interest in the outcome of disciplinary proceedings stemming from the disturbance that she could not be neutral and detached.

The cases cited by appellants, including Wolff, supra Braxton v Carlson 483 F 2d 933 (3rd Cir. 1973) Meyers v Alldredge 492 F 2d 296 (3d Cir 1974) and Taylor v Schmidt, supra for the contrary proposition all involve tripartite disciplinary committees where the associate or assistant warden was one member. The other members were not in his chain of command. In that situation the security officers bias or prejudice can be neutralized by the presence of the other two. See Davis, supra Sec. 1203 at p. 157.

In New York a single person conducts the superintendents proceedings 7 N.Y.C.R.R. part 253. If, by virtue of her interest, or participation in events, there is a danger of bias or prejudice, there is no countervailing force to act as a check.



* (continued) from a threat to the security of the institution
THE COURT: I understand what you are getting at.(42)
The court then, was well aware of the problems discussed in Colligan and Taylor.
/Even as limited by Judge Stewart the testimony sufficient to justify the finding of lack of impartiality. However, recognizing that the proceeding was a motion for a preliminary injunction, appellees are prepared to throughly explore through discovery and trial, the issue of the Deputy. Superintendent for Security interest in the disciplinary proceedings.

Nor can the state claim that necessity compels this departure from the usual restraints against the probable bias of the chief security officer. There are two other Deputy Superintendents of equal rank with Miss. Clement (43-44) as well as other ranking staff whose jobs are not directly related to institutional security. Each of those people are fully capable of conducting Superintendents Proceedings.

Finally, Deputy Superintendents Clements relationship with Margaret Gatling fall within the second proscription disdussed in Withrow. The testimony is uncontradicted that Ms. Gatling was highly critical of Ms. Clement, and in fact told her that she thought Ms. Clement had decided on the punishment before the hearing (18-20,22). In that situation the only way for the hearing to have the appearance of justice is for some one else to conduct it. Withrow, supra, Taylor v Hayes supra Mayberry v Pennsylvania, supra, Pickering v Board of Education supra

## POINT II

### PRISONERS SHOULD NOT BE CONFINED IN SPECIAL HOUSING FOR MORE THAN 48 HOURS WITHOUT A HEARING ABSENT EXIGENT CIRCUMSTANCES, AND THEN FOR NO MORE THAN SEVEN DAYS

A prompt hearing and determination is an essential element of due process Goss v Lopez U.S. , 95 S. Ct. 729 (1975) Morrisey v Brewer 408 U.S. 485, 487 (1972). A speedy hearing is required because if the administrator is empowered to act before a hearing, as in parole revocation cases, inordinate delays can result in the same deprivations as if no hearing was held. Thus

Margaret Gatling was in segregation for more than 25 days before she was given notice of charges against her (3a), and according to Deputy Commissioner Burke, she could then have been released without a hearing ever having been held (12a).

Appellants do not contest the seven day rule imposed by Judge Stewart because shortly after he rendered the decision in the instant case, this Court in Crooks v Warne, supra 516 F 2d 839 directed that in ordinary circumstances charges must be served within 24 hours after a prisoner is placed in segregation to be followed by a hearing 24 hours later. See also Diamond v Thompson, supra (hearing required within 48 hours of transfer to segregation in emergency situation) Tillman v Board of Prison Inspectors, not officially reported, 8 Clearinghouse Rev. 512 (no. 73-2771 E.D. Pa. Sept. 5, 1974). There is no reason why the 48 hours limitation imposed in Crooks should not be applied to the prison generally. In the typical rule violation the facts are simple and any necessary investigation can be completed within a few hours. For instance during the second week of July, 1974, Marsha Padilla was accused of having contraband in her cell, to wit: unauthorized black pepper. (Tr. p 141). It is inconceivable that charges could not be drawn and the prosecution and defense could not be prepared to proceed within 48 hours of the reported infraction. See e.g. Diamond v Thompson supra 364 F. Supp at 666.

Appellees recognize that emergency situations, such as natural catastrophes or rebellions on the scale of Attica, may require alteration of the usual rules. However, the danger inherent

in an "exigent circumstances" rule that is not carefully circumscribed as to time and scope is its susceptibility for abuse. As the First Circuit said in Hoitt v Vitek 497 F 2d 600 (1st Cir. 1974) and re-iterated in Morris v Travisono 509 F 2d 1358,1360 (1st Cir. 1975) :

> [E] mergencies, however, cease to be emergencies when they continue indefinitely and inmates cannot be kept confined to their cells indefinitely in alleged violation of their constitutional rights merely on the assertion of the Warden that prison security requires it. The unreviewable discretion of prison authorities in what they deem to be an emergency is not open-ended or time unlimited.

In Hoitt, in a situation resembling the instance case, prisoners were kept in isolation for periods of from three weeks to two months following a disturbance. The court indicated that summary judgment would be appropriate. 497 F 2d at 600. In Johnson v Anderson 370 F Supp 1373 (D. Del 1974) the court severely criticized a state of emergency that the Warden said lasted for five months.

Even those courts that recognize the necessity for an "exigent circumstances" rule rarely permit isolation much beyond one week. For instance, in Diamond v Thompson, supra, 48 hours was sufficient where a prisoners strike was involved, in Johnson v Anderson,supra,nine days was sufficient where the emergency was precipitated by an attack on a guard, and in Morris v Travisono, supra, 2 weeks was sufficient in a full fledged riot.

In any case,if a hearing cannot be conducted within the

prescribed time, the proper remedy is to return the prisoner to general population and conduct the hearing within a reasonable time thereafter. That is the usual rule in criminal prosecutions. For instance New York provides that an incarcerated defendant must be released on recognizance if a grand jury does not act within forty five days of the date that the case is held for the grand jury. Crim. Proc. Law Sec. 180.80. New York statutes also require that a felony defendant incarcerated longer than ninety days must be released on recognizance if the state is not then ready for trial. Crim. Proc. Law Sec. 30.30 (2). This court has promulgated similar rules for the trial of criminal cases in the District Courts. Second Circuit Rules for the Prompt Disposition of Criminal Cases.

The purpose of isolation in emergency circumstances is to give the prisoners an opportunity to cool down, thus de-fusing a potentially dangerous situation. In all but the most extreme circumstances tensions will have subsided within one week of any incident. By that time there will no longer be any danger to prison security, and the prisoner can be safely returned to population until a hearing can be held. Therefore, the seven day rule of the District Court should apply to exigent circumstances.

## CONCLUSION

A primary function of procedural due process is to provide fundamentally fair procedures to ensure that basic rights are not arbitrary abrogated. Goss v Lopez supra 95 S. Ct. at 936.

Two essential elements are a neutral and detached hearing officer and a prompt hearing. To permit open ended pre.hearing confinement based on unarticulated exigent circumstances is to subvert speedy hearing requirements and to invite arbitrary action.

To do justice, the hearing must give the appearance of justice. To permit the prisons chief security officer to adjudicate cases involving breaches of security is to permit her to act as judge in situations in which she has a direct personal and professional interest. To do so is to taint the proceedings with the appearance of a biased hearing officer. Accordingly the order of the District Court should be affirmed.

Respectfully submitted,

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APPENDIX

Excerpts from testimony

Q Did you see the Adjustment Committee again on September 9?

A No, I saw it on the 13th.

Q You saw the Adjustment Committee on the 13th?

A Yes.

Q What happened at that Adjustment Committee?

A Same thing. She told me she had to see me on a weekly basis.

MR. SATTLER: I did not hear a word of that.

A Same thing happened. She said it was formalities.

Q Did there come a time that you were given written notice that you were to appear before a Superintendent's proceeding?

A Yes.

Q When was that?

A September 13.

Q How long had you been in segregation up until that time?

A I think it was approximately sixteen days.

Q When did you finally go before the Superintendent's proceeding?

A On the 14th.

THE COURT: That was September?

THE WITNESS: Yes.

THE COURT: Sure.

Q Did Miss Morris come and discuss the charges with you?

A The only thing that Miss Morris said was that she did not think it was fair the way they had tricked her into doing that, and she said that when I explained to her my position as far as Miss Clements being the Deputy Superintendent of Security, and because of the disturbance technically the security of the institution was threatened, she said that she fully agreed with me, and I asked her if it would be possible for me to have my proceeding in front of Miss Wagner since it seems as though I would have to have one.

She said that Miss Clements and Miss Warne were going along with anything that she said, they just wanted me to have a Superintendent's proceeding.

Q Miss Morris told you that?

A Yes.

Q Was there a Superintendent's proceeding conducted?

A Yes.

Q Did you attend?

A No, I did not.

Q Why not?

A Because I was afraid.

MR. LATIMER: She is telling you what the practice is.

THE COURT: I think I understand your point, Mr. Latimer, and Mr. Sattler has conceded it; which is, I take it, to the effect that if charges were being considered in any event, nothing was given to Miss Gatling in writing because the rules do not provide for it.

Q Going back to the period following August 29 for a moment, how long were you in segregation before you were served with notice of any charges at all against you?

A Somewhere between 25 and 29 days.

THE COURT: This is what period of time?

MR. LATIMER: This is between the riot on the 29th and the time she was served with notice of a Superintendent's proceeding.

Q While you were in segregation, were you permitted to participate in any of the prison's programs?

A No.

Q Were you permitted out of your room for any period of time?

A Well, for six and a half days, we were not allowed to shower, and water was turned off.

Then on the seventh day we came out for showers, and after twelve days we came out for exercise.

Q Were you locked in your room 24 hours a day?

A Yes.

Q Were you permitted at all during this whole period of time before you had a Superintendent's proceeding to participate in whatever programs you were involved in before the 29th?

MR. SATTLER: I object to the form of the question.

A No.

MR. SATTLER: There is no evidence she was involved in anything.

Q Were you doing work assignment before the 29th on campus?

A Yes.

Q Were you involved in any programs before the 29th?

A Yes.

Q Can you tell the Court what your work assignment was?

A Industry.

Q And what programs were you participating in?

A The horticulture class, and I was going -- I was taking American Economics with Westchester Community College.

Q Are you a high school graduate?

A Yes.

Q During the time that you were in segregation after August 29, were you permitted to work any place?

A No.

Q Were you permitted to continue the programs?

A No. They brought a psychology course in from Westchester Community and I asked Mr. Sypols and Miss Cradle about getting me the course with it, and Miss Cradle in turn told me that she asked Miss Clements, she went to Miss Clements and Miss Randolph about it and they told her no, definitely not, not as long as I was in segregation .

Q Were you injured on the night of the 29th?

A Yes.

Q Did you request medical attention?

A Yes.

Q Did you receive medical attention?

A No.

Q Did there come a time when you were X-rayed?

A Yes.

Q When was that?

A September 26.

Q When did you first request X-rays?

A I requested X-rays -- the first time I seen the doctor was the 3rd of September.

THE COURT: What is the point of this, Mr. Latimer?

Q What happened when you went to see the Board?

A I just sat there for a couple of minutes and they said, "All right, Mrs. Padilla." They brought up about the incident of August 29; and I didn't know how much longer I was going to be in segregation, I really didn't know what was going on yet at this point, what they planned to do. And when I got my Board slip it said to return in April of '75.

Q At that time had you been charged by the institution with any infraction stemming out of August 29?

A No, nothing.

Q So that when you went to Family Court, you were deprived of custody of your child?

A Yes.

Q Had you had any adjudication at that time as to your involvement in the August 29 incident?

A No.

Q When did you next go before the Adjustment Committee?

A September 24; my Superintendent's proceeding.

Q Did you see the Adjustment Committee --

MR. SATTLER: Wait a minute. If your Honor please--

MR. LATIMER: I will clarify that.

Q Did you see the Adjustment Committee again on September 19 before the Superintendent's proceeding?

THE COURT: I do not see that it establishes that at all.

Q Did you have any other dealings with her?

A Not with Miss Gangnier.

THE COURT: Did she slap you?

THE WITNESS: No.

Q Did there come a time that you had a Superintendent's proceeding?

A Yes.

Q This is after August 29 we are talking about now.

A After, yes.

Q Were you eventually -- or were you served with notice of a Superintendent's proceeding?

A Yes, I was.

Q When?

A I think it was about September the 20th, some place around there, 22nd.

Q Can you tell us the circumstances that you were served with this notice?

A They called me up my room. Officer came to the door and said my parole officer wanted to see me. I come out my room and I went in this room, and Mr. O -- I call him Mr.O -- I can't pronounce his right name so I call him Mr. O -- he was in there; but I never seen this man before. He

part in putting down and quelling the disturbance.

THE COURT: That is my question, that she knew what she was talking about. Is that what you are saying? Is that what you are trying to show?

MR. LATIMER: No, I am again trying to show that -- well, I do not really see how that could be an impartial type of hearing.

MR. SATTLER: He cannot see it but she was -- Lieutenant Wilson did not participate in the Superintendent's hearing where this lady received forty days.

MR. LATIMER: She did.

MR. SATTLER: Whatever was alleged --

THE COURT: I understand that point but I take it then that what you are getting at is not to show that there was some basis for the charges but that since she saw what was happening it could not be an impartial hearing.

MR. LATIMER: That is exactly right, your Honor.

Q What happened when you went in to see the Adjustment Committee on September ??

A I was told I was being held for investigation. I asked, for an investigation for what, and she spoke on the disturbance. She did not go any further. I said, "I wish to see mylawyer." I was refused that. I complained about the food being shoved under the door and not receiving a

shower. And I was told there was nothing she could do about that. The water was turned off and it was kind of, you know, no hot water, two sinks was stopped up and backed up. I complained about that. I received nothing there.

I asked when would I be released or when would I have a Superintendent's hearing. I received nothing there.

Q And were you told how long you were going to be kept in segregation at that Adjustment Committee meeting?

A No, I was not.

Q Did you ask to present witnesses on your behalf?

A Yes, I did. Mainly I asked for my lawyer and my diet.

Q What do you mean, your diet?

A I have bleeding ulcers and I was put on baby food. But at the time when I went in the segregation they wouldn't give me baby food and they were shoving the food under the door, so I was hungry because I can't eat filth, and I am not a filthy person. No matter what I am supposed to be, I am not filthy. And I couldn't eat it so when it came under the door I just let it sit there. And two days later. they put me on baby food. And four days after that they just took the baby food away.

Q And you told this to Lieutenant Wilson at the Adjustment Committee?

I look to see what the Adjustment Committee can do? What section of this?

MR. SATTLER: I think those are the amended rules.

THE WITNESS: 252.5(e).

MR. SATTLER: Under the amended rules, your Honor.

Q You have testified that an Adjustment Committee-- and this is, I believe, the effect of your testimony -- may confine a person to special housing pending further investigation or a disposition of the charges. Is that substantially correct? Is that a fair statement of your testimony?

A Yes, I think it is.

Q Is there, to your knowledge, any time limit within which such investigation must be completed?

A The Adjustment Committee can only confine the individual for seven days.

Q May the Adjustment Committee extend that period of time?

A Yes.

Q May the Adjustment Committee extend that period of time for 21 days?

A Not to 21 days; only to seven days, successively, in other words.

Q May the net effect of successive Adjustment Committee meetings be confinement for 28 days?

A That would be possible.

Q May the net effect of Adjustment Committee confinement be for 42 days?

A That's possible.

Q Duirng this 42-day period, if it would extend that time, has the inmate been given formal notification in writing of the charges against her?

A She may not have been.

Q Is it your testimony, then, that in effect an inmate can be confined for much longer than seven days by the Adjustment Committee without ever being advised of the formal charges, if any, that are pending against her?

MR. SATTLER: If your Honor pleases, I object to the form of the question, because the question presumes that formal charges will be presented, while in the Adjustment Committee process formal charges are not necessary.

THE COURT: I don't think the question presumes anything. He just said, "Is this what you testified to?" I don't know whether he did or not. I don't know whether the witness thinks he did.

MR. SATTLER: I think that should be the first question, whether or not --

MR. LATIMER: Your Honor, he answered it.

THE COURT: I overrule your objection.

MR. SATTLER: All right.

Q Now, at the end --

THE COURT: Did we get an answer to that quest

MR. LATIMER: The answer was yes.

THE COURT: Was it?

THE WITNESS: No, not to the second question, a it is only a qualified answer, because there are no forma charges in an Adjustment Committee. So that is true, th wouldn't be any formal charges.

Q So that at the end of this 42-day period, where this person has been confined in a special housing unit without any charges against her at this time, the Adjustme Committee can then say, "Go back to the general population' is that true?

A That is true.

Q Or it can then say, "We have the basis for formal charges and we are going to hold you for a Superintendent's proceeding"; is that true?

A That's true.

Q This can occur while the inmate is in either a special housing unit or a segregation unit while pending disposition of the charges, with no formal charges that she can possibly defend herself; is that correct?

A There would not be formal charges as long as it

He is asking me when were they given their charges.

Q But you don't give them the statement of charges before the Adjustment Committee meeting?

A No. This was prior to the Superintendent's proceedings as they were prepared.

THE COURT: All right.

BY MR. LATIMER:

Q Youtestified based on your affidavit that there were 21 women who received a one-week or more extension of confinement in special housing excluding Carol Crooks, is that correct?

MR. SATTLER: Your Honor, she didn't say there were 21 women; she said there were 21 instances.

MR. LATIMER: I am sorry. I will rephrase the question.

Q There were 21 instances of extensions by the Adjustment Committee?

A 351, I believe, residents were reviewed, cards that were reviewed, that were in the file at that time.

Q And these are all cases --

THE COURT: Excuse me.

BY THE COURT:

Q Who conducts the Superintendent's proceedings, either yourself or who else?

A It can be whoever we designate.

Q Who in fact does it?

A Miss Clement, Mr. Curry, Mrs. Wagner, Captain Woolley, Assistant Deputy Salmon.

THE COURT: All right. I was under the mistaken impression obviously that it was either yourself and one other person, but that is not so apparently.

THE WITNESS: No.

MR. LATIMER: We have 21 of these instances.

BY MR. LATIMER:

Q And these were instances of persons to whom the Adjustment Committee, after a consideration of misbehavior or infraction reports, decided were necessary to place in segregation for whatever reason, is that right?

A Into special housing, yes.

Q When you talk about special housing, that would be the west wing, is that correct?

A The west wing.

Q Do conditions in the west wing conform to the definition in Chapter VI of a segregation unit?

MR. SATTLER: We are just wasting time.

THE COURT: I sustain the objection.

Q Have there been instances of women held in special housing or segregation pending investigation more than seven

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A No.

Q Did you know at that time that you had been charged with an infraction on October 25th by C. L. Robinson?

A No.

Q And you had your superintendent's proceeding on November 13th?

A Yes.

Q How long had you been in segregation after the 60 days when you had the superintendent's proceeding?

A Twenty days.

Q Can you tell us what the result of the superintendent's proceeding was that was held on the 13th?

A I saw Lieutenant Hinkley and three officers and one sergeant had wrote that I tried to walk away from the fight, and the officer that wrote the charge, the other charge, she wouldn't take the charges back.

So Lieutenant Hinkley told me that usually you would lay in segregation for two weeks for a fight. Being that I had been there 20 days, she felt that the next day at 7:00 o'clock I should be let out. That would be 21 days that I stayed.

Q And did that in fact happen?

A Yes.

Q Have you seen the Adjustment Committee since then?

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Q When was that 60-days lock supposed to be up?

A October 30th.

Q Did you see the Adjustment Committee on November 4th?

A Yes.

Q What happened at that time?

A I was told that my charges were being referred to superintendent's proceedings.

Q Did you know what the charges were at that time -- on November 4th?

A I didn't know what their charges were but I figured that it was because of the fight that I had.

Q Were you given a notice of the charges on November 4th?

A No.

Q Did you go in to the Adjustment Committee again on the 13th of November?

A Yes.

Q What happened on the 13th of November?

A They told me that my proceedings would be held on the 14th or the 15th or the 16th -- whatever date -- and that was all.

Q And at that time, what charges -- were you given notice of what the charges were?

CERTIFICATE OF SERVICE

This is to certify that on December 2, 1975 a copy of the within brief and supplemental appendix was served by mail on the Attorney General of new York state by at his offices at No. 2 World trade Center, New York, N.Y.

Attorney for Plaintiffs